IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 335 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? :

2. To be referred to the Reporter or not? : Yes, for para- 4, 5 & 6

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MUSTUFABHAI ABDULHUSSAIN VORA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 335 of 2001

MR CR ABICHANDANI for Petitioner No. 1

MR SS PATEL Ld. APP for Respondent No. 1

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 13/03/2002

ORAL JUDGEMENT

1. Heard learned counsel Mr. CR Abichandani for the petitioner and Mr. SS Patel learned APP for respondent-State.

2. Mr. Abichandani has taken me through the entire record and evidence recorded by the trial court during the course of trial and the relevant documents namely the panchnama of the scene of the incident and Post mortem note. Learned counsel appearing for the parties have taken me through both the judgments i.e. judgment holding the petitioner guilty delivered by the Ld. JMFC and the judgment of learned Addl. Sessions Judge allowing the appeal partly preferred by the present petitioner acquitting him in the main offence punishable under sec. 304A of IPC. While acquitting the accused from the offence punishable under sec. 304A of IPC the ld. Addl. Sessions Judge has confirmed the finding as to the guilt proved against the applicant for the offence punishable under sec. 279 of IPC and also under sec. 177 and 184 of M.V. Act. The Ld. Addl. Sessions Judge has awarded two months S/I and a fine of Rs. 1000/, in default, S/I for one month for the offence punishable under sec. 279 of IPC and for the offence punishable under sec. 177 and 184 of MV Act has awarded S/I of one month and a fine of Rs. 500/, and in default, order to under go 15 days S/I. These sentences were to run concurrently.

3. The grievance of the learned counsel for the petitioner is that Ld. Addl. Sessions Judge has failed in appreciating the entire sent of evidence available on record and has considered certain inadmissible part of evidence. Ld. Addl. Sessions Judge has also not considered the material contradiction and the improvement made by the important witnesses of the prosecution side. The Ld. Addl. Sessions Judge ought to have acquitted the accused from all the charges levelled against him. The reasons adopted by the ld. Addl. Sessions Judge holding the accused guilty of the offence, while confirming the order of conviction so far as the offence punishable under sec. 279 of IPC and under sec. 177 and 184 of MV Act are concerned, the Ld. Addl. Sessions Judge has not assigned any cogent and convincing reasons nor has said categorically that he adopts the reasons assigned by the ld. Magistrate. So, technically, the finding recorded by the ld. Addl. Sessions Judge can be said to be based on surmises or inference, which normally the court trying the criminal case is not permitted to draw.

4. This Court is conscious of the fact that normally concurrent finding on facts recorded, should not be disturbed and the revisional court while exercising the jurisdiction under sec. 397 r/w 401 of Cr.P.C. The High

Court where intends to reverse the finding recorded as to facts by two courts below, then such findings can be up-set only on sound reasons. It is rightly submitted by Mr. Abichandani that the acquittal recorded by the Ld. Addl. Sessions Judge so far as the offence punishable under sec. 304A is concerned, no acquittal appeal is preferred by the State because till date, the present petitioner has not been served with such notice of admission.

5. (i) Ld. Magistrate has observed that the petitioner is guilty of both the offences i.e. offence punishable under sec. 279 of IPC and 304A of IPC simultaneously, i!n such a case it was obligatory on the part of the Ld. Addl. Sessions Judge, as to how he has separated these two offences holding the petitioner guilty of one of the offence punishable, i.e. for the criminal negligence punishable under sec. 279 of IPC. This is more relevant where no such clear evidence is available on record.

(ii) Two witnesses allegedly examined as eye witnesses, were not eye witnesses. The contradiction brought on record during the course of cross-examination by putting a positive suggestions to these witnesses clearly indicates that they had stated something contrary, to the police, to the story unfolded before the trial court. The officer who has recorded the statements of these two witnesses namely Police Sub Inspector Mr. Patel has not been examined. So, it was not possible for the accused to prove this contradiction by bringing it to the notice to a person who had recorded the statement of these two witnesses. Non-examination of I.O., therefore, has resulted into a serious prejudice to the accused. The Ld. Addl. Sessions Judge has not taken care of this situation at all.

(iii) Mr. Abichandani has rightly submitted that in such a contingency, the court should either accept the submissions of the petitioner or to verify from the statement recorded by the I.O. as to what was the version of these two witnesses before the I.O. On reading the deposition of these two witnesses and the statement in inverted comas in reference to their previous police statement recorded by the Ld. Magistrate and the facts reflected in the deposition of these two witnesses it is clear and can reasonably inferred that these two witnesses namely Dilip Thakore and Pratap Thakore were not present at the scene of the incident. Material improvement made by these witnesses are required to be ignored. The deposition of these two witnesses has

not carried the case of prosecution any further.

(iv) Lodging of alleged FIR by accused to the police station is satisfactorily established by the prosecution by examining the PSO, Police Head Constable Mr. Navalsing. But as per the settled proposition of law, both the courts below ought to have held that witness Navalsing has proved only one aspect that police was informed about the incident by the present accused. The incriminating part of the FIR could not have been used against the accused and, so it was not legal for any courts below to infer anything adverse on the strength of the version recorded in the FIR namely the case of prosecution. The use of the FIR is limited. It can be used for the purpose of contradiction or corroboration to test the veracity of maker to appreciate the basic case of prosecution. Undisputedly, in the present case, the accused has not been examined as witness and so FIR remains a statement of an accused and, therefore, inadmissible in evidence. Of course, it was open for the prosecution to establish by other circumstantial evidence that at the relevant point of time, the accused was driving the offending vehicle. But, there is no legal or admissible evidence on record to this effect.

(v) It seems that the driving licence of the present petitioner is also not brought on record. The prosecution has failed to prove that the present petitioner is a driver and authorised to drive any motor-vehicle. It is not the case that he was driving the vehicle without licence.

(vi) The prosecution could have placed reliance on the principle of "res ipsa loquitur" by proving the scene of offence panchnama. On careful consideration of panchnama ex. 6, it transpires that this panchnama does not give any evidence which can help the prosecution to prove the act of negligent on the part of the driver of the vehicle. The Panchnama ex. 6 has been wrongly exhibited by the trial court. None of the part of this panchnama ex. 6 has been legally proved by any competent witnesses. This Court has reason to believe that this panchnama must have been drawn by the I.O. and Head Constable Mr. Navalsing has not stated anything more that he is a recorder of the complaint ex. 15. The panchnama of the scene of the incident was tendered in evidence during the course of deposition of one Munir Rasul Shaikh ex. 5. The same has been drawn by PSI, Kapadvanj Police Station. So, he must be Mr. Patel. Even if panch has turned hostile, this panchanama could have been proved by Mr. Patel. So, this unproved

panchnamam or any part of it cannot be read as a legal piece of evidence. The Ld. Addl. Sessions Judge could not have considered this panchanama as reliable piece of evidence against the accused. Of course, the Ld. Addl. Sessions Judge has not said in his judgment that he is satisfied with the contents of the panchanama drawn by the IO. But, if this panchanama is taken out from the set of evidence then there is nothing incriminating remains on record under which the present petitioner can be linked with the incident or at least offence.

6. No independent witness has said that at relevant point of time, the present petitioner was in the driver seat. For the sake of arguments, if it is accepted that the petitioner was in the driver seat even then it is obligatory further on the part of the prosecution to prove that he has driven the vehicle in rash and negligent manner which can be said to be an act of criminal negligent punishable under sec. 279 of IPC. It is also pertinent to note that the hospital papers are not on record. The post mortem note also does not speak that the present petitioner had taken the deceased, as indoor patient to the hospital. The careful reading of the FIR ex. 15 indicates that the same has been recorded after the death of the injured victim. So, it is doubtful whether this would be the first information ever received by police for the alleged accident. Non production of hospital papers also goes to the root cause because it can reasonably be inferred that hospital must have informed the concerned police station on receipt of the patient as to the incident of the accident. For short, in absence of any legal admissible evidence, the learned trial judge ought not to have convicted the applicant for any of the offence for which he was charged. Obviously, therefore, the confirmation of sentence of the present petitioner-accused by the ld. Addl. Sessions Judge for the offence punishable under sec. 279 of IPC or under sec. 177 and 184 of MV Act is bad in law. The finding of the learned Addl. Sessions Judge for confirming particular conviction is also cannot be said to be based on a sound reasons. Basic rules of appreciation of evidence has been violated by both the courts below and the same are not taken care of. Re-appreciation of evidence while exercising the revisional jurisdiction is not permissible but this prohibition is there where courts below have tried to appreciate the legal evidence and in a proper perspective and, therefore, this court has no hesitation in allowing this revision application by reversing the finding recorded by the Ld. Addl. Sessions Judge.

7. In the result, this Criminal Revision Application is allowed. The order of conviction recorded by the Ld. Addl. Sessions Judge while deciding Criminal Appeal No. 56 of 1999 vide judgment dated 13.7.2001 is hereby quashed and set aside. The accused is hereby ordered to be acquitted from both the offences i.e. offence punishable under sec. 279 of IPC and under sec. 177 and 184 of MV Act. Fine, if paid, be refunded to the applicant-accused.

Bail bond and personal bond executed by the present petitioner shall stands discharged. DS permitted.

(C.K. BUCH, J.)

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